JOHN HUDSPETH

IBLA 75-156 Decided June 27, 1975

Appeal from decision of Administrative Law Judge R. M. Steiner in Oregon 5-73-2 affirming a decision of the District Manager canceling appellant's grazing license.

Affirmed.

1. Words and Phrases -- Grazing Permits and Licenses: Cancellations and Reductions

   "Two Consecutive Years." The term "two consecutive years" in 43 CFR 4115.2-1(e)(9) means two consecutive application years from the date established by a district manager as the deadline for filing grazing applications.

2. Grazing Permits and Licenses: Cancellations and Reductions

   Under 43 CFR 4115.2-1(e)(9), cancellation of a grazing license is proper when a user of the Federal range fails to include in an application for grazing license renewal, the base property qualifications (for active, nonuse, or combination thereof) on or before the duly established filing date for two consecutive grazing seasons, regardless of whether the lands surrounding the leased lands are controlled by licensee and his relatives.

APPEARANCES: J. C. Van Voorhees, Esq., Bodie, Minturn, Van Voorhees & Larson, Prineville, Oregon, for appellant; Lawrence E. Cox, Esq., Office of the Solicitor, Department of the Interior, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE GOSS

John Hudspeth appeals from an August 27, 1974, decision of Administrative Law Judge R. M. Steiner which affirmed a May 16, 1973, decision of the District Manager, canceling appellant's grazing license in accordance with 43 CFR 4115.2-1(e)(9). That regulation provides in part:

> (e) Terms and conditions. The issuance and continued effectiveness of all regular licenses and permits will be subject to the following terms and conditions:
>
> (9) Base property qualifications, in whole or in part, will be lost upon the failure for any two consecutive years:
>
> (i) To include in an application for a license or permit or renewal thereof, the entire base property qualifications for active, nonuse, or combination of active and nonuse * * *. [Emphasis added.]

Appellant had grazing privileges in the Prineville Unit since 1966. The period of concern in this case commenced on December 3, 1970, the date on which appellant filed his application for a grazing license for the 1971 grazing season. Although the deadline for filing applications had been set at November 30, 1970, appellant was issued a license for the 1971 grazing season. On November 3, 1971, the District Manager, Prineville District, Bureau of Land Management, sent grazing applications to all Federal range users in the District and a letter (Exh. F) notifying them that applications for the 1972 grazing season must be filed by December 3, 1971. The letter contained the following recommendation:

> If you do not wish to use the range to the full extent of your privileges or find it necessary to apply for all non-use, it will be to your benefit to apply in that manner. In this way your base property qualifications are protected but you will be billed only for your active use.

No application was filed. The District Manager sent appellant a letter (Exh. L) dated December 16, 1971, informing him that his application for grazing use for the 1972 season had not been received and reminding him to submit his application with a written justification for late filing or appear before the advisory board at its next meeting to state his reason for belated filing. Appellant took no action.

The following year, on November 6, 1972, the District Manager sent a letter (Exh. G) similar to that of November 3, 1971, advising Federal range users to file their applications for the 1973 season by November 22, 1972. It contained the same recommendation that the user apply in such a manner as to protect his base property qualifications. Appellant failed to file by the deadline, and a "Notice of Advisory Board Adverse Recommendation" (Exh. H) dated December 12, 1972, was sent requiring appellant to attend a protest meeting on January 11, 1973. An application was enclosed, which was required to be filed by January 4, 1973. On April 3, 1973, appellant filed his application (Exh. I).

The Bureau issued a Show Cause Notice (Exh. N) on April 18, 1973, stating that appellant's grazing privileges are held for cancellation for the following reason:

> Failure for two consecutive years to apply for your entire privilege, either on an active, non-use or combination active and non-use basis will result in a loss of qualifications not applied for (43 CFR 4115.2-1(e)(9)).

The notice continued:

> You have fifteen (15) days from receipt of this notice within which to show cause to the District Manager why the above action should not be taken.
>
> Accordingly, your application for active use in the Rockwood and Laier-Grove Allotments in its present form is hereby rejected. Enclosed is a billing for the AUM's applied for. This use is authorized as temporary, non-renewable and does not constitute a grazing privilege.

Appellant responded to this notice on May 2, 1973 (Exh. O). He explained that the Federal land in the Rockwood and Laier-Grove Allotments is surrounded by private property owned by appellant and his relatives. He asserted that any other user of the allotments would have to trespass on appellant's land. Appellant stated that this land is necessary to his cattle operation and that a loss of base privileges would decrease the value of his property. It would also require him to alter his operation because the temporary use permit would not necessarily be available.

Appellant explained that the failure to file the applications, at least for the 1972 grazing season, was due to the inadvertence of his employees. He was not aware until early 1973 that these applications, including the one for 1973, had not been made. Appellant stated he immediately made application for 1973 when he realized the application had not been filed.

On May 16, 1973, the District Manager canceled appellant's license (Exh. P) on the basis of 43 CFR 4115.2-1(e)(9). He stated the records reveal that appellant's last two applications were dated December 3, 1970, and April 3, 1973, "a no-application period of 28 months." During this 28-month period, the files included four reminders to make application, the last being a certified mail notice received by appellant's representative on December 14, 1972.

A hearing was held on March 6, 1974, and the Administrative Law Judge rendered his decision on August 27, 1974. The Judge found that appellant had failed to file an application for grazing privileges on or before the duly established filing date for two consecutive grazing seasons. He explained that the term "two consecutive years" as used in 43 CFR 4115.2-1(e)(9) has been construed to mean two consecutive application years, citing William H. Casey, 9 IBLA 163 (1973); Mrs. C. B. Stark, Nevada 6-62-2 (January 28, 1964); and Anawalt Ranch & Cattle Co., 70 I.D. 6 (1963). He concluded that cancellation of appellant's base qualifications was proper pursuant to 43 CFR 4115.2-1(e)(9).

Hudspeth appeals alleging essentially the following:

(1) Departmental regulation 43 CFR 4115.2-1(e)(9) is patently ambiguous and appellant was never notified as to its meaning.

(2) Appellant has used the allotment for a substantial period and the objectives of the leasing program under 43 CFR 4110.0-2 are to protect continuing livestock operations.

(3) There is no access to the land because it is completely surrounded by land of appellant and relatives, and no one else is seeking grazing rights.

(4) Appellant was never notified he would lose his license if he failed to make application for a two year period, and he was led by notices

from the local district office to rely on the fact that he would receive prior notice of any action which would interfere with his grazing privileges.

(5) The District Manager accepted appellant's 1973 grazing application notwithstanding the late filing, and issued appellant a grazing permit without special stipulations; therefore, the application should relate back to the original filing deadline just as if satisfactory justification had been shown for belated filing.

The Bureau filed a brief requesting that the Administrative Law Judge's decision be affirmed and responding to appellant's contentions.

[1, 2] We find the meaning of "two consecutive years" as used in 43 CFR 4115.2-1(e)(9), is not ambiguous. In Casey, supra, the Board adopted the following definition:

"[T]he `two consecutive years' referred to * * * is interpreted to mean two consecutive application years and not two calendar years * * *."

The application of the regulation here is in harmony with the purposes of the grazing laws. Applications must be received timely so that rights may be adjudicated prior to the grazing season. 1/ The Administrative Law Judge is correct that ownership of the lands surrounding the allotment does not preclude the application of the mandatory regulation.

1/ The procedure followed herein comports with the provisions of the regulation as interpreted for Departmental employees in BLM Manual 4115.21B13:

13. Application for Full Qualifications. Base property qualifications will be lost in whole or in part if a licensee or permittee fails for two consecutive years to apply for his full base property qualifications either on an active, nonuse, or combination active and nonuse license or permit (43 CFR 4115.2-1(e)(9)(i)). The period involved will be calculated as a two calendar-year period from the date established by the district manager as being the deadline for filing grazing applications for that specific year or period (43 CFR 4115.2-1(a)). For example, if in a given situation the district manager had established December 30 as being the date before which all applications should be filed then the determination of the two-year period involved under 43 CFR 4115.2-1(e)(9)(i) would

As to appellant's argument that he relied on the fact that he would be informed prior to any action that would interfere with his grazing privileges, there is nothing in the record to cause appellant to be so misled. On the contrary, the notices of November 3, 1971, and November 6, 1972, made it clear that grazing applications were to be filed by a certain date. They also contained the recommendation that if the user did not wish to use the range to the full extent of his privileges or found it necessary to apply for all non-use, it would be to his benefit to so apply in order to protect his base property qualifications. The purpose of these letters was to remind appellant to file an application. The District Office has no duty to notify a user of the Federal range that he will lose his base property qualifications if he does not file for two consecutive years. Appellant is charged with knowledge of the regulations and must comply with them in order to maintain grazing privileges. As a matter of courtesy, however, the District Manager did afford appellant repeated warnings.

Regarding appellant's final contention that the District Manager treated the application as if it had been timely filed, appellant argues that under Stark, supra, the application would relate back to the original filing deadline just as if satisfactory justification had been shown for the belated filing. The present case can be distinguished from Stark, however, because in Stark the District Office found that the belated filing was justifiable. Appellant offered the excuse that the applications were not timely filed due to the negligence of his employees. Negligence of an employee does not excuse late filing. 2/

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fn. 1 (continued)
be counted from the December 30 date. Consequently, in this example, if an individual had submitted his last application on December 1, 1960, and the deadline for such application was December 30, 1960, then failure to apply for the privileges within the period from December 30, 1960 through to [sic] December 30, 1962 would result in the loss of the base property qualifications. * * *

The operations of 43 CFR 4115.2-1(e)(9)(i) and (ii) are mandatory, leaving the district manager no choice but to proceed under 43 CFR 4115.2-1(d). A recommendation of the district advisory board is not required in the application of 43 CFR 4115.2-1(e)(9). * * *

2/ Cf. G. Wesley Ault, 16 IBLA 291 (1974), for a similar situation in an oil and gas leasing case.

When the District Manager issued a license to appellant for the 1973 grazing season together with the Show Cause Notice, he specifically stated that the use granted appellant "is authorized as temporary, non-renewable and does not constitute a grazing privilege."

Appellant's other arguments have been reviewed but do not warrant reversal of the Judge's decision. We hold that under 43 CFR 4115.2-1(e)(9) cancellation of appellant's grazing license is proper when he fails to file an application for a grazing license on or before the duly established filing date for two consecutive grazing seasons.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.

Joseph W. Goss
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Joan B. Thompson
Administrative Judge